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IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,
Respondent
(Libellant-Appellant below).

PETITIONER'S REPLY BRIEF.

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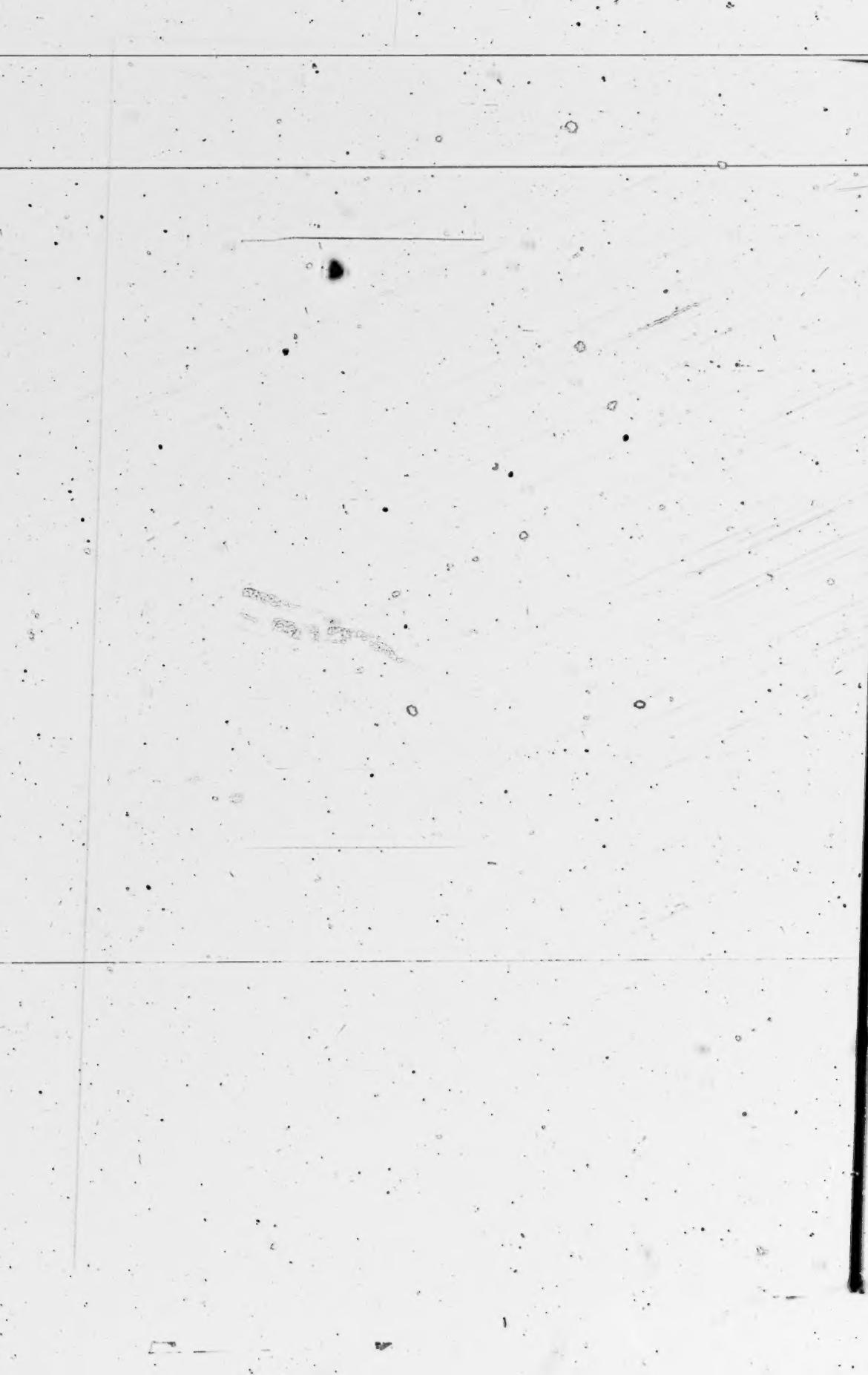

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The authorities cited in respondent's brief in support of its contention that the action of the District Judge in "fixing" the amount of bond on July 12, 1943, amounted to an allowance of an appeal, fall into four main classes, all involving circumstances different from the case at bar:

1. Cases in which actual application for allowance of appeal was made during the statutory period, and the right to appeal was held not defeated by the court's refusal to act. In *Steffler* v. *United States*, 319 U. S. 38 (respondent's brief, p. 9), petitioner timely filed with the District Court clerk a petition for leave to appeal from a criminal conviction in forma pauperis, which the clerk

returned to him by mail. After the Circuit Court of Appeals denied another application for leave to appeal in forma pauperis, this Court granted certiorari on the ground that petitioner had made proper application for allowance of appeal and it was the duty of the District Court to act upon his request to proceed in forma pauperis. In the case at bar the record shows no similar situation.

2. Cases in which the court, within the statutory period and upon application therefor, performed an official act which it could do only upon the basis that it had allowed an appeal. The following cases cited at page 6 of respondent's brief are in this category:

Brandies v. *Cochrane*, 105 U. S. 262, where complainants prayed an appeal on the same day the decree was entered, which was allowed upon their giving bond. No bond was furnished under that allowance, but within two years from the entry of the decree the Circuit Judge approved an appeal bond and signed a citation. This Court held that by so doing the Circuit Judge allowed an appeal. *Sage* v. *Central Railroad Co.*, 96 U. S. 712, where this Court held that, when one of its justices approved a supersedeas bond during the term, he allowed the appeal. *Crescent Wharf & Warehouse Co.* v. *Pillsbury*, C. C. A. 9, 93 F. (2d) 761, cert. den. 304 U. S. 571, where a bond for appeal costs was presented to the District Judge and approved by him within the three months' period. *Brown* v. *McConnell*, 124 U. S. 489, where one of the justices of this Court, upon appellant's application, signed a citation returnable to the present term, but with no acceptance of security. This Court held that this action was in legal effect the allowance of an appeal but ordered the case dismissed unless appellants should file security. Similarly, in *Burley Welding Works* v. *Lawson*, C. C. A. 5, 141 F. (2d) 964, appellant gave notice of appeal and furnished a

bond for costs which was approved by the court within the three months' period. Likewise, in *Weinstein* v. *Black Diamond S.S. Corp. et al.*, C. C. A. 2, 31 F. (2d) 519, cited at page 13 of respondent's brief together with *Crescent Wharf & Warehouse Co.* v. *Pillsbury* and *Burley Welding Works* v. *Lawson*, supra, a supersedeas bond was filed and approved by the District Judge within the three months' period.

The facts presented in the present case are wholly different from the facts upon which the above authorities rested. In the present case the District Judge did not approve any bond for costs or issue a citation or other document within the three months' period. He did no more than inform respondent's counsel that a bond for costs on appeal should be for the amount of $250 (R. 30). No bond was then presented to him, and in fact none was issued until four days later or filed until the day after the three months' period expired, and then without submission to the Judge for his approval at all (R. 1, 30).

The distinction between the situations presented in the second class of cases listed above and the case at bar was pointed out by the Circuit Court of Appeals for the Ninth Circuit in *McCrone* v. *United States*, 100 F. (2d) 322, affirmed 307 U. S. 61, where the action taken within three months and relied on as an application for allowance of appeal consisted of the filing of a notice of appeal and the settlement and allowance by the District Court of a bill of exceptions. Distinguishing its previous opinion in *Crescent Wharf & Warehouse Co.* v. *Pillsbury*, supra, relied on at pages 6, 12-13 of respondent's brief, the court held that this was not equivalent to application for and allowance of an appeal under 28 U. S. C. § 230. It is noteworthy that the dissenting opinion of Haney, C. J., did not state that the actions taken amounted to an allowance of appeal, but was founded upon the opinion that the Federal Rules of Civil Procedure, subsequently effective, required simplified procedure so as "to abolish many technicalities which could be used to defeat a decision on the merits" (p. 325).

3. Cases in which an appellant has been entrapped into adopting incorrect procedure. In *R. F. C.* v. *Prudence Group*, 311 U. S. 579, cited at pages 6, 5, 8 and 10 of respondent's brief and principally relied on by the court below (R. 32), appellant was misled by a decision of its own Circuit Court of Appeals into believing that appeals from certain compensation orders in bankruptcy could be taken without application to the Circuit Court of Appeals for leave to appeal. The exceptional circumstances of that case are pointed out at pages 20-23 of petitioner's main brief. In *Crump* v. *Hill*, C. C. A. 5, 104 F. (2d) 36, cited at page 8 of respondent's brief, appellant was misled by appellee's action in acknowledging service of a notice of appeal and designation of contents of record, and in filing a designation of contents of record, all within the three months' period. No similar situation is presented in the case at bar.

4. Cases in which an appeal, validly taken under one section of a statute, has been regarded as properly taken under another section of the same statute. In this category belong *Wilson* v. *Alliance Life Ins. Co.*, C. C. A. 5, 102 F. (2d) 365, and *Baxter* v. *Savings Bank of Utica*, C. C. A. 5, 92 F. (2d) 404, in which the court below held that an appeal perfected under Section 24a of the Bankruptcy Act could be taken as perfected under Section 24b of the same act (11 U. S. C. § 47(a) and (b)). No parallel situation is presented here.

Miller v. *Tietjen & Lang No. 2*, C. C. A. 3, 143 F. (2d) 711, cited at pages 14-16 of respondent's brief, falls into none of the foregoing categories. In that case the court held that the mere filing of a notice of appeal within three months was "a due and sufficient application for the formal allowance of the appeal" in admiralty. The court's opinion cites the decision of the court below in the case at bar as authority for its holding which is in direct conflict

with *Alaska Packers Assn. v. Pillsbury*, 301 U. S. 174, cited in petitioner's main brief.

The case at bar falls into none of the classes of the authorities cited in respondent's brief except the last mentioned case, which clearly was erroneously decided. Respondent's inquiry of the District Judge as to the amount of a bond for costs on appeal was merely a request for information. The District Judge's "fixing" the amount of the bond at $250 was only a statement of what a rule of court would require concerning a step to be subsequently taken by a party desiring to appeal. No such bond being submitted within the three months' period, the consultation with the District Judge was purely anticipatory to a later application for an allowance of appeal, which respondent did not in fact make until three weeks after the statutory period expired (R. 18, 19).

The objections to the requirements of 28 U. S. C. § 230, presented at page 10 of respondent's brief, would more properly be addressed to Congress than to the courts. They are unfounded, however, for in actual practice no hardship or confusion is involved in submitting to a District Court proper appeal papers in an admiralty case and requesting its allowance of appeal. Difficulty and confusion arise only when the rule is violated, and then the rule itself is denounced.

Respectfully submitted,

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Dated, New York, December 12, 1944.